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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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The Justice Department and amicus briefs base their argument that integrated broiler producers are not within the scope of the Capper-Volstead Act on a misspecification of the charges in this case, an exaggeration of the reach of our argument, a misunderstanding of the principles of statutory construction, and a variety of other errors.

1. The briefs (especially those of the amici) misstate the scope of the complaint. Previously the Justice Department had characterized the charge in this case as follows: "The members of the cooperative routinely exchange price information and at-

tempt, in other ways, to ensure a market at stable prices for their products." (Br. in Opp. 2.) Stabilizing agricultural prices through greater information is an objective most students of agricultural policy would applaud. Coupled with the Department's concession that price and other market conditions in broiler production are the same as those prevailing in agriculture generally (A. 14-15; Pet. Br. 6), the relationship between the challenged conduct of petitioner and the social policies embodied in the Capper-Volstead Act and related agricultural statutes is clear.

Too clear—hence the efforts at obfuscation in the amicus briefs.[1] The brief of the American Farm Bureau Federation[2] argues that if petitioner's claim to immunity is upheld, it will be misused to depress the prices paid growers for their services in the production of broiler chickens. No such conspiracy is alleged in the complaint and nothing in the language, policy, or history of the relevant statutes indicates that it would be shielded from antitrust attack.[3]

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[1] The Justice Department is not the worst offender in this respect, but it does (at p. 5 of its brief) introduce confusion by stating that the *original* complaint in this case charged a restriction in the supply of broilers as well as an exchange of price information. That complaint, which does not even appear in the printed record, was superseded when the Department later filed a complaint limited to conduct which it conceded to be within the Capper-Volstead exemption. A subsequent footnote in the Department's brief (p. 20 n.41) states that the current complaint continues to allege supply restrictions; in fact, the only section of the complaint even remotely relevant to an allegation of supply restriction, paragraph 9(f) (A. 95), refers to withholding, presumably temporarily and presumably to prevent a glut, already produced broiler parts from market, not to any limitation on the amount produced. An exchange of price information designed to stabilize prices could, of course, increase the supply of broiler chickens; it would have no necessary tendency to reduce it.

[2] The brief, incidentally, fails to state how many—if any—broiler growers are members of the American Farm Bureau Federation.

[3] Predatory practices directed against nonmembers of a cooperative are not within the Act's protective ambit. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960).

The amicus brief of the treble-damage plaintiffs irresponsibly marshals "evidence" (p. 12) of petitioner's wrongdoing consisting entirely of magazine articles. The charges in the treble-damage cases have been denied by petitioner; their validity has never been adjudicated; the defendants in the treble-damage suits are not defendants in this case, and some are not and never have been members of NBMA. It bears repeating that the Act does not confer an unlimited immunity from antitrust: neither predation nor agreements with nonproducers (Pet. Br. 22-23) are within its scope; and the Secretary of Agriculture has express statutory authority to prevent any undue price enhancement caused by a cooperative's activities (Section 2 of the Capper-Volstead Act, Pet. Br. A-1 to A-2).

2. The Justice Department appears to recognize that a construction of the Capper-Volstead Act which would deny its benefits to a cooperative of integrated broiler producers is illogical. The integrators own the flocks; they initiate, control, and supervise the entire production process; and they incur 90 percent of its costs. If they took just one more step—as many of them have done, and many more will do if the Fifth Circuit's decision in this case is affirmed—and altered their contractual arrangements with the growers so that the latter became employees rather than independent contractors, then the integrators would clearly be protected by the Capper-Volstead Act (see *infra* p. 9), even though they would be bigger and more integrated than they are now.

Because these results make no sense, the Justice Department is led to suggest that sense is not important in interpreting the Capper-Volstead Act. The Act is derided as "special interest legislation" (Br. for U.S. 10, 20)—a "populist statute" (*id.* at 10) to be construed without the aid of reason. The Department relies on an article which states that in interpreting legal rules laid down by legislatures, "The notion of an appeal to the 'spirit' of the original compromise—that is, to its purposes against its

manifestation in the form of rules—makes no sense because the rules, in the conception involved here, *have no spirit*." Kennedy, *Legal Formality*, 2 J. Leg. Studies 351, 383 (1973) (emphasis in original); see also *id.* at 369.

This conception of the Capper-Volstead Act is directly contradicted by this Court's decision in *Tigner v. Texas*, 310 U.S. 141 (1940). There the Capper-Volstead Act was described as one of a series of statutory "manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process." *Id.* at 147. A Populist conception of the statute also cannot be squared with the draftsmen's evident intent to protect large plantation owners and corporate farmers, including, as the Department also concedes, a fully integrated broiler producer (*i.e.*, one who employs rather than contracts with the grower).

Further, if legislation is to be interpreted without reference to its purposes, there is no way to answer difficult questions of statutory interpretation. Hence the string of contradictions and *non sequiturs* that the Department offers as "reasons" for construing the Capper-Volstead Act to exclude the integrated broiler producer. In the same breath the Department suggests that integrators are excluded from the Act because they are "great aggregations of capital" (Br. for U.S. 12) yet affirms that " 'agribusinesses' that . . . grow their own chickens" (*id.* at 16 n.35) are included—thus it is the greater aggregation of capital that a statute directed against "great aggregations of capital" protects. Despite the anticapitalist bias that the Act is said to embody, the grower's own capital investment is emphasized as a reason for classifying growers (and, of course, plantation owners) as farmers (*id.* at 18). And if the grower's capital investment is combined with the integrator's, the resulting "aggregation of capital" is fully protected. Growers are said to bear market risk indirectly because the demand for their services would fall if the demand for broiler chickens fell (*id.* at 19),

but, if so, the integrators' employees are also farmers since they, too, would be adversely affected by a fall in the demand for their employer's product (for example, they might be laid off).

When economics fails, there is metaphysics to fall back upon. The Department's brief states (p. 18): "The contribution of the grower is what turns a bird from a chick into a marketable broiler"—as if without chicks (owned and supplied by the integrator), feed (also supplied by the integrator), veterinary services and supervision and cooping and haulage and processing (ditto), there would be any marketable broilers.

The Department argues that persons "engaged in agricultural production *as farmers*" (emphasis added) are a subclass of producers that excludes the broiler integrator. This reading of the statute renders as surplusage all of its language before the word "farmers". In fact, "farmer" is synonymous with "agricultural producer"; the purpose of the list in which "farmer" appears is not to narrow but to broaden the term "engaged in agricultural production."[4]

Nor is the Department's position supported by its references to legislative history (Br. for U.S. 13 n. 27). The references are of two kinds. The first consists of obviously metaphorical terms for farmer which, if read literally, would exclude the grower as much as the integrator (e.g., "tiller of the soil").

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[4] The only occasion for narrowing would be if agricultural production were very broadly defined—as in Section 1 of the Cooperative Marketing Act, 7 U.S.C. § 451, which defines agricultural product to include "any and all products raised or produced on farms *and processed or manufactured products thereof*" (emphasis added). This is broader than the concept of agricultural product under the Capper-Volstead Act (see *infra* pp. 6-7). Hence the Cooperative Marketing Act distinguishes between agricultural producers and "original producers of agricultural products," and equates the latter term to "farmers." 7 U.S.C. § 455. Since all agricultural products within the scope of the Capper-Volstead Act are original products, it is plain that in that Act agricultural producer and farmer are interchangeable terms.

The second consists of terms that encompass the integrated producer: "this privilege is not to dealers or handlers or speculators for profit; it is limited to the *producers themselves*" (emphasis added). The Act excludes not the integrated producer but "the gambler in agricultural products, who plays no part in nor contributes to the production of those products." 59 Cong. Rec. 8022 (1920).

There is we submit no substitute for rational and purposive interpretation of the Capper-Volstead Act. The purpose of the Act is to promote agricultural prosperity. It can only be thwarted by an interpretation that places integrated broiler producers beyond the Act's protection unless they complete their integration by taking over the grow-out phase and transforming the growers from independent contractors into employees.

3. The Justice Department tries to discredit our position by exaggerating its reach. We do not contend that only integrators, and not growers, are farmers within the meaning of the Capper-Volstead Act; there is no need to choose between growers and integrators (Br. for U.S. 9) in deciding who is a "farmer" under the Act. Integrator and grower are both farmers just as a plantation owner and his tenant farmer are concededly both farmers under the Act.

The Department also exaggerates the reach of our argument by defining "agricultural product" much too broadly, as any product *made from* an agricultural product (Br. for U.S. 14-15, 23 n. 45)—a definition which would include a straw hat, a pair of leather shoes, and a woolen sweater. In fact, no manufactured products, even if consumed as food—frankfurters, refined sugar, bread, pet food, chicken feed, etc.—are agricultural products under the Capper-Volstead Act. *E.g.*, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) (packing houses manufacturing canned and concentrated juices, but not participating in the production of oranges

at all, ineligible to join exempt cooperative). Broiler chickens are prepared for market by being plucked and dressed but they are not a product *manufactured* from chicken (as chicken soup is). That is why the Department stipulated that they are an agricultural product. The distinction between a manufactured and an agricultural product explains why Congress rejected the Phipps amendment (which would have extended the protections of the Capper-Volstead Act to certain producers of manufactured products such as refined sugar) and why this Court in *Bayside* held that truck drivers employed by a chicken feed mill were not agricultural laborers (Pet. Br. 16-17, 19).

A related exaggeration of our position is the Department's innuendo that we deem every entity with a financial stake or interest in agricultural production a "farmer" (Br. for U.S. 14, 17), presumably including banks that lend farmers money, manufacturers of agricultural machinery, and buyers of agricultural products such as packing houses. That is not our argument or logically entailed by it. The entities referred to have no operating role or equity interest in the production of an agricultural product. They are creditors (or potential creditors) only. Integrated producers are conceded to be the producers of an agricultural product. The sole issue is whether they forfeit their status as Capper-Volstead producers by contracting out the grow-out phase of broiler production to independent contractors rather than using their own employees as growers. We contend they do not.

4. To our argument that the practical administrative interpretation of the term "farmer" by the responsible farm agencies includes integrated broiler producers the Justice Department replies that the Farm Credit Act applies to "producers" rather than to "farmers." The legislative history makes clear, however, that these are equivalent terms under the Farm Credit Act—and by implication under the Capper-Volstead Act as well—by stating that the eligibility of cooperatives for loans

under the Farm Credit Act "is based on the definition in the Capper-Volstead Act." H. Rep. No. 89-593, 92d Cong., 1st Sess. 4 (1971). The Cooperative Marketing Act is similarly limited to "producers of agricultural products" (Br. for U.S. 21 n.42). It is true that the definition of agricultural *product* is broader under the Farm Credit and Cooperative Marketing Acts than under the Capper-Volstead Act (see note 4 *supra*), but the difference is irrelevant here because it is conceded that petitioner's members are producers of agricultural products within the meaning of the Capper-Volstead Act.

That the Department of Agriculture has assisted petitioner would seem to refute the suggestion in the Justice Department's brief that petitioner is a cooperative of those "processors and middlemen that were the objects of suspicion" by the framers of our agricultural policy (Br. for U.S. 10). One of the facts stipulated to by the Justice Department is that broilers are "distributed through middlemen intervening between the integrator and the consumer." (A. 14) The Department's brief in this Court has confused the middleman with the integrator.

5. The Justice Department contends we have presented no record evidence that affirmance of the decision below will lead to more integration and concentration in the poultry industry (Br. for U.S. 24). This is an argument of desperation, for the relevant facts are, of course, legislative rather than adjudicative in nature, and therefore do not require a trial to establish. (The record does contain data relevant to future prediction: for example, 30 percent of petitioner's members already do at least some growing internally [A. 189-90].) As noted in our opening brief, impartial expert observers believe the Fifth Circuit's decision will accelerate the existing trend toward integration into the grow-out phase that is transforming the grower from an independent contractor into an employee (Pet. Br. 24-25). To this the Department responds with unsupported conjecture—for example, that the tax laws may discourage further

integration (Br. for U.S. 24). But the tax advantages lie with farmer status—and provide an additional reason for believing that the decision below will accelerate the trend toward integrated production (Pet. Br. 24 and n.20). As for the speculations (Br. for U.S. 24 and n.46) that further integration might be discouraged by labor considerations, by the need for additional capital investment by the integrators, and by the allegedly inferior productivity of employees versus independent contractors (even when they are the same people), these factors have not arrested the current trend toward full integration to which the decision below, if affirmed, will lend added momentum. Moreover, there is no need for the integrators actually to purchase the grower's land and buildings; it would seem enough to satisfy the Department's test for an "actual farmer" if the integrators rewrote their contracts with the growers to make the latter employees rather than independent contractors. And the contracts could offer the employees bonuses or other incentives that would induce the same effort from them as the existing contracts do from the contract growers.

6. The Department might conceivably attempt to challenge efforts by integrators to revise their grower contracts so as to preserve their Capper-Volstead status, but this possibility merely illustrates another problem with the Department's "owner or operator of a farm" standard: it will invite endless dispute. The simplicity of such a test is deceptive. To satisfy it, a producer must prove either title to land or buildings in which a crop or flock is grown or an employment relationship with the growers, thus injecting niceties of real property and agency law that have no place in a statute designed to advance agricultural prosperity. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977). Much ingenuity will be devoted to changing legal forms in order to avoid the formalistic rule adopted by the Fifth Circuit, and, perhaps, to challenging the changes. Our suggested approach, in contrast, requires merely a judgment

whether a conceded agricultural producer forfeits his status by contracting out a minor (in cost terms) portion of the production process. This is not only a simpler test but one more consistent with the purposes of the Capper-Volstead Act.

CONCLUSION

In its zeal to expand the antitrust laws into every nook and cranny of economic life, the Department of Justice disparages the Capper-Volstead Act as "special interest legislation" that is to be given a narrow and grudging interpretation unrelated to the substantial purposes of the Act in promoting a distinctive agricultural policy. The Department's proposed interpretation would discourage beneficial exchanges of information designed to cope with the notorious instability of agricultural markets, would foster vertical integration in agriculture, and would serve only to vindicate a narrow and dogmatic conception of the appropriate accommodation between antitrust and other federal laws.

The judgment below should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

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